traditional state-law remedies. The additional extra-statutory exemption for state-law "holder" class actions recognized by the court below is (1) inconsistent with SLUSA's statutory text and structure; (2) unsupported by its legislative history; and (3) unwarranted and unnecessary as a matter of public policy. Accordingly, the decision below should be reversed.

1. The plain language and structure of SLUSA do not support an exemption for state-law "holder" class actions. The "in connection with" requirement of § 10(b) and Rule 10b-5 is met if the alleged misconduct "coincides" with the purchase or sale of securities. *SEC* v. *Zandford*, 535 U.S. 813 (2002). Applying the same construction to SLUSA means that a class action alleging misconduct in connection with *someone*'s purchase or sale of securities is precluded, even if the plaintiff does not have standing to bring a private Rule 10b-5 action under the rule of *Blue Chip Stamps*. One year before SLUSA was enacted, this Court held that the *Blue Chip Stamps* rule is *not* a substantive restriction on the "in connection with" requirement. *United States* v. *O'Hagan*, 521 U.S. 642 (1997). Congress is presumed to have maintained that distinction in SLUSA.

2. Nor does the legislative history support an exemption for state-law "holder" class actions. Congress understood that SLUSA would preclude some cases that could be brought under state, but not federal law. At the same time, it expressly exempted some traditional state-law remedies, including derivative actions. Congress thus struck a careful balance between private enforcement in federal and state courts. The court below upset that balance by recognizing an extra-statutory exemption for "holder" class actions.

3. There is no sound public policy support for exempting state-law "holder" class actions from SLUSA. Although the legislative history is silent as to "holder" class actions, that silence is explained by the fact that such actions were unknown before SLUSA was enacted. They have proliferated since solely as a means to evade the restrictions of the PSLRA. But the whole point of SLUSA was to stop the "flight" of securities litigation to state court. "Holder" suits

are rife with opportunities for abuse and, if allowed to proceed under state law, would harm issuers and investors alike. And they are unnecessary for investor protection, because purchasers and sellers have sufficient recourse to hold wrongdoers accountable in private Rule 10b-5 litigation (in addition to public enforcement proceedings). Allowing non-transacting "holders" to maintain class actions under state law, in short, would contravene the carefully calibrated scheme of securities enforcement established by Congress in the PSLRA and SLUSA.

ARGUMENT

ICI has a uniquely balanced perspective on the issue in this case, because its members identify with both plaintiffs and defendants in securities fraud lawsuits. Precluding "holder" class actions, as ICI advocates, is entirely consistent with the interests of mutual funds and their investors. Investor protection, which is both the overriding goal of the securities laws and one of ICI's central missions, requires reversal of the decision below.

Mutual funds are significant investors, holding almost one-quarter of all outstanding stock of American public companies, and they and their shareholders have a vested interest in robust enforcement of the securities laws to eradicate securities fraud. ICI's members, therefore, approach this case as potential *plaintiffs* (or class members) in securities fraud actions. "Holder" class actions, however, are not necessary to protect mutual funds or their investors from fraud or deceitful conduct, because federal and state securities laws already provide ample recourse against such unlawful conduct. And such actions are rife with opportunities for abuse, to the detriment of both mutual funds and their investors.

Mutual funds are also significant issuers of securities, with trillions of dollars in shares outstanding, and they are regulated, and subject to liability, under the securities laws. ICI's members are thus also interested in the scope of SLUSA preclusion as potential *defendants* in securities fraud lawsuits. Permitting "holder" class actions could signifi-

cantly harm the interests of mutual funds and their investors. Such actions drive down investment returns by subjecting issuers, including both mutual funds and the companies in which they are invested, to meritless claims that are costly to defend and settle.

In both the PSLRA and SLUSA, Congress struck a careful balance between the interests of investors and the interests of issuers and other market participants. Well-founded private securities litigation may ultimately benefit investors by combating fraud and contributing to good corporate governance, and class action lawsuits can serve as a valuable supplement to public enforcement of the securities laws. H.R. Conf. Rep. No. 104-369, at 31. At the same time, unmeritorious strike suits can adversely impact shareholder returns by forcing companies to spend time and money defending themselves against frivolous claims. *Id.* at 23. In light of such concerns, Congress determined in SLUSA that class actions involving securities fraud should proceed, if at all, in federal court pursuant to the PSLRA, while expressly preserving a number of traditional state-law remedies. H.R. Conf. Rep. No. 105-803, at 13. An additional extra-statutory exemption for state-law "holder" class actions is (1) inconsistent with SLUSA's statutory text and structure; (2) unsupported by its legislative history; and (3) unwarranted and unnecessary as a matter of public policy. Accordingly, the decision below should be reversed.

1. The plain language and structure of SLUSA do not support, much less require, an exemption for state-law "holder" class actions. If alleged misconduct "coincides" with a purchase or sale of securities by someone (including someone other than the plaintiff), then the "in connection with" requirement of Rule 10b-5 is met. *SEC* v. *Zandford*, 535 U.S. 813, 822 (2002). Applying "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" (*Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotations omitted)), a lawsuit alleging misconduct that coincides with *someone*'s purchase or sale of securities is pre-

cluded by SLUSA even if the plaintiff does not meet the *Blue Chip Stamps* standing limitation. *Kircher*, 403 F.3d at 484 ("*Blue Chip Stamps* combined with SLUSA may mean that [such claims] must be litigated as derivative actions or committed to public prosecutors, but this is not a good reason to undercut the statutory language"). The contrary conclusion of the court below is irreconcilable with the statutory framework.

The purchaser/seller limitation announced in *Blue Chip Stamps* is a rule of *standing*, not a substantive element of the Rule 10b-5 cause of action. It "does not stem from a construction of the phrase 'in connection with the purchase or sale of any security'" in Rule 10b-5. *Holmes* v. *SIPC*, 503 U.S. 258, 284 (1992) (O'Connor, J., concurring). Rather, it rests on "what may be described as policy considerations," particularly the "danger of vexatiousness" inherent in securities fraud litigation. *Blue Chip Stamps*, 421 U.S. at 737. The Court pointed to two specific dangers: First, even meritless cases have significant settlement value "so long as [the plaintiff] may prevent the suit from being resolved against him by dismissal or summary judgment"; and second, the "potential for possible abuse of the liberal discovery provisions" available to plaintiffs. *Id.* at 740-41. To combat these problems, the Court adopted a rule limiting the class of private Rule 10b-5 plaintiffs to those who had actually purchased or sold securities. *Id.* at 754-55.

The *Blue Chip Stamps* Court recognized that its judicially created standing limitation would prevent some private plaintiffs from bringing a Rule 10b-5 action for conduct that met the *statutory* elements of a § 10(b) violation, including the "in connection with" requirement. 421 U.S. at 738; *see also Chiarella* v. *United States*, 445 U.S. 222, 238 n.* (1980 (Stevens, J., concurring) ("the limitation on the right to recover pecuniary damages in a private action identified in *Blue Chip* is not necessarily coextensive with the limits of [Rule 10b-5] itself"). This does not prevent vigorous enforcement of the securities laws, because the SEC and federal

prosecutors can still bring administrative and criminal proceedings against § 10(b) violators.[2]

In *United States* v. *O'Hagan*, 521 U.S. 642 (1997), the Court held unequivocally that the *Blue Chip Stamps* standing limitation does not apply to actions by public officials to enforce § 10(b) and Rule 10b-5. *Id.* at 665 ("Criminal prosecutions do not present the dangers the Court addressed in *Blue Chip Stamps*, so that decision is 'inapplicable' to indictments for violations of § 10(b) and Rule 10b-5") (quoting *Naftalin*, 441 U.S. at 774 n.6). Rather, the statutory "in connection with" element is met if "*someone* buy[s] or sell[s] the security during the period of allegedly fraudulent conduct." Louis Loss & Joel Seligman, *Securities Regulation* 3721 (3d ed. 2004).

The court below "suppose[d] that Congress meant to import the settled [*Blue Chip Stamps*] standing rule along with the 'in connection with' phrase as a substantive standard." Pet. App. 28a. This supposition, however, overlooks the fact that only a year before SLUSA was enacted, this Court had reiterated that the purchaser/seller standing limitation is *not* a substantive aspect of the "in connection with" requirement. *O'Hagan*, 521 U.S. at 665. By expressly incorporating the "in connection with" requirement, but saying nothing of a purchaser/seller limitation, Congress presumably maintained this distinction in SLUSA. *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts").

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[2] In 2004 alone, the SEC and state regulators secured roughly $2.5 billion in disgorgement and penalties on behalf of mutual fund shareholders. PricewaterhouseCoopers LLP, *2004 Securities Litigation Study* 18, http://www.10b5.com/-2004_study.pdf.

When Congress wants to adopt a purchaser/seller limitation, it well knows how to do so. *See* Insider Trading & Secs. Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677, 4680-81 (codified at 15 U.S.C. § 78t-1) (limiting statutory right of action to contemporaneous purchasers and sellers). Congress chose not to in SLUSA, instead adopting language that—as authoritatively construed by this Court—expressly precludes state-law actions alleging misconduct that coincides with *someone's* purchase or sale of securities. *O'Hagan*, 521 U.S. at 658 (parallel language of § 10(b) "requires deception 'in connection with the purchase or sale of any security,' *not* deception of an identifiable purchaser or seller") (emphasis added); *see also Carpenter* v. *United States*, 484 U.S. 19, 24 (1987).

In *O'Hagan*, this Court held that the *Blue Chip Stamps* standing limitation is inapplicable to cases that "do not present the dangers" of vexatious litigation that led the Court to adopt the rule. *O'Hagan*, 521 U.S. at 665. SLUSA preclusion obviously does not present these dangers; to the contrary, SLUSA (like the PSLRA before it) was enacted to address precisely the same evils that animated the *Blue Chip Stamps* policy determination. *See Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1634 (2005). Accordingly, SLUSA should not be circumvented on the basis of a judicially created rule that was designed to ameliorate, not exacerbate, precisely the same concerns that underlie SLUSA preclusion. *Cf. A.C. Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U.S. 38, 41-43 (1941) (refusing to apply a judicially created rule that would hinder the purpose of the securities laws).

2. The decision below is no more faithful to the legislative history of SLUSA than it is to the statutory text and structure. The court below thought that "Congress sought only to ensure that class actions brought by plaintiffs who satisfy the *Blue Chip* purchaser-seller rule are subject to the federal securities laws." Pet. App. 35a. But if that were the case, one might reasonably expect at least one reference to *Blue Chip Stamps*, or the purchaser/seller standing limitation, in the debates that preceded SLUSA's enactment. But there

is none. It does not appear from the record that *Blue Chip Stamps* was even considered, let alone implicitly codified, by any legislator who voted on SLUSA.

The court below nonetheless read SLUSA's legislative history as "suggesting that Congress understood that it was only preempting claims that could have been brought in federal court to begin with." Pet. App. 32a. But SLUSA's legislative history plainly demonstrates precisely the opposite. Members of both the House and Senate recognized that SLUSA would preclude some class actions that might be permissible under state law but could not be brought by a private plaintiff under federal law for a variety of reasons. *See e.g.*, S. Rep. No. 105-182, at 21-22 (1998) (additional views of Sens. Sarbanes, Bryan & Johnson); 144 Cong. Rec. S. 4778, S. 4786 (1998) (ltr. by B. Roper of the Consumer Fed'n of Am., introduced by Sen. Sarbanes); *id.* at S. 4797-98 (statement of Sen. Johnson); 144 Cong. Rec. H. 6052, H. 6056 (1998) (statement of Rep. Stupak); *see also Testimony of U.S. Secs. & Exch. Comm'n Concerning S. 1260, The "Secs. Litig. Uniform Standards Act of 1997" Before the S. Banking Subcomm.*, 105th Cong. 21 (1997) ("Levitt Testimony"), http://www.sec.gov/news/testimony/testarchive/-1997/tsty1997.txt ("Because a number of states allow claims that cannot be brought under federal law, . . . the bill will preclude relief as a practical matter" for some investors).

For example, "there is no aiding-and-abetting liability in private actions for most federal securities fraud claims." Levitt Testimony at 21; *see Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). By contrast, "[f]orty-nine states as well as the District of Columbia allow for some form of aiding-and-abetting liability." Levitt Testimony at 21. But a proposed amendment that would have allowed state-law aiding and abetting claims to proceed in federal court was defeated. 144 Cong. Rec. S. 4778, S. 4784 (1998).

Similarly, "private actions under the federal securities laws are subject to a short statute of limitations." Levitt Testimony at 20; *see Lampf, Pleva, Lipkind, Prupis & Petigrow*

v. *Gilbertson*, 501 U.S. 350 (1991) (superseded in part by Pub. L. No. 107-204, Title VIII, § 804(a), 116 Stat. 801 (2002) (codified as amended at 28 U.S.C. § 1658)). "By contrast, 33 states allow for longer limitations periods." Levitt Testimony at 21. Congress rejected a proposed amendment, however, that would have allowed a plaintiff asserting a precluded state law class action to bring a federal claim under the applicable state law statute of limitations. 144 Cong. Rec. at S. 4803.

These two examples show that the court below was simply wrong in concluding that Congress intended SLUSA to preclude only those actions that could be brought under federal law. *Cf.* 144 Cong. Rec. at S. 4805 (statement of Sen. Dodd) (the "purpose of this bill is a uniform standard for . . . nationally traded securities"; "[i]f you are going to apply 50 different statute of limitations you have just destroyed the very purpose of the legislation"). The mere fact that "holder" class actions cannot be brought by private plaintiffs under Rule 10b-5, therefore, does not mean that Congress intended to exempt such actions from SLUSA's preclusive reach. This is confirmed by the fact that Congress considered, and expressly exempted, a number of *other* state-law remedies.

In response to concerns that SLUSA "would eliminate important areas of state corporate law that have long coexisted with—indeed, predate by almost a century—the federal securities laws" (Levitt Testimony at 22), Congress adopted amendments to ensure that certain remedies available under state corporate law would remain available. S. Rep. No. 105-182, at 6. SLUSA exempts actions brought under the law of the State where the issuer is incorporated or organized involving tender offers and communications concerning certain requests for shareholder action (15 U.S.C. §§ 77p(d)(1)(B) & 78bb(f)(3)(A)(ii)), as well as actions under contractual agreements between issuers and indenture trustees (*id.* §§ 77p(d)(3) & 78bb(f)(3)(C)). "These exceptions have become known as the 'Delaware carve-outs.'" *Malone* v. *Brincat*, 722 A.2d 5, 13 (Del. 1998).

In addition to the Delaware carve-outs, SLUSA exempts from its coverage class actions brought by States, political subdivisions, and state pension plans (15 U.S.C. §§ 77p(d)(2) & 78bb(f)(3)(B)), and "exclusively derivative action[s] brought by one or more shareholders on behalf of a corporation" (*id.* §§ 77p(f)(2)(B) & 78bb(f)(5)(C)).[3] SLUSA also limits its class action definition to suits brought on behalf of 50 or more persons, and specifically provides that "a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member." *Id.* §§ 77p(f)(2) & 78bb(f)(5)(B).

The express exemptions that Congress included in SLUSA all contain built-in safeguards against frivolous litigation. For example, derivative litigation requires a threshold showing of merit in order to overcome the demand requirement and judicial scrutiny before settlement. And traditional state corporate law actions must be brought under, and conform to, the law of the state of incorporation. "Holder" class actions, by contrast, have no comparable limitations to protect against abuse; to the contrary, such actions present precisely the dangers that Congress sought to ameliorate by enacting SLUSA and the PSLRA. *See* Joshua D. Ratner, Comment, *Stockholders' Holding Claim Class Actions Under State Law After The Uniform Standards Act of 1998*, 68 U. Chi. L. Rev. 1035, 1058 (2001).

Moreover, the statutory exemptions further demonstrate the careful balance struck by Congress in SLUSA: To ensure

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[3] The statutory exemption for derivative cases is important because most claims brought by non-transacting "holders" are actually derivative in nature. *Schuster* v. *Gardner*, 127 Cal. App. 4th 305 (2005); *Manzo* v. *Rite Aid Corp.*, No. 18451-NC, 2002 Del. Ch. LEXIS 147, *20 (Dec. 19, 2002), *aff'd*, 825 A.2d. 239 (Del. 2003); *Arent* v. *Distrib. Sci., Inc.*, 975 F.2d 1370, 1373 (8th Cir. 1992); *Crocker* v. *FDIC*, 826 F.2d 347 (5th Cir. 1987).

effective enforcement of the securities laws while protecting both companies and investors from abusive litigation, Congress made a series of judgments regarding whether particular claims could be brought in state court or under state law. The court below upset that balance by recognizing an extra-statutory exemption for state-law "holder" class actions. *Cf. Lander* v. *Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 114 (2d Cir. 2001) ("because Congress delineated certain exceptions to the general preemptive force of SLUSA, [federal courts should be] reluctant to impose additional exceptions, particularly when such exceptions are unsupported by the text, history, or purpose of the statute"). Such judicial second-guessing contravenes the congressional intent underlying SLUSA.

3. Just as nothing in the statute or legislative history requires, or even supports, exempting state-law "holder" class actions from SLUSA preclusion, no sound policy basis exists for recognizing such an exemption. In this regard, it is important to note that in *Blue Chip Stamps* this Court was "free to weigh" policy considerations because "[n]o language" in the statute or regulation "speaks at all to the contours of a private cause of action for their violation." 421 U.S. at 749; *see Holmes*, 503 U.S. at 289-90 (Scalia, J., concurring in the judgment) ("the limitation we approved in *Blue Chip Stamps* was essentially a legislative judgment rather than an interpretive one"). By contrast, the Judiciary has no warrant to rely on policy considerations to change or disregard plain statutory language. *See, e.g., CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause").

The court below placed great weight on the fact that the legislative history of SLUSA "contains no specific mention of holding claims," perhaps because "Congress may have been unaware of the existence of state law holding claims." Pet. App. 31a-32a (internal quotation omitted). But silence alone is obviously an insufficient basis for inferring a judicial exemption to a statute that, on its face, precludes "holder"

class actions. *See, e.g., Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history"). Even if congressional silence could invite judicial policymaking, however, the policies expressed in the PSLRA and SLUSA provide a clear answer to the question in this case. *See* Pet. App. 29a (recognizing that the persistence of "holder" class actions may undermine the goals of the PSLRA).

Congress's silence on the issue of "holder" class actions is easily explained by the fact that such claims simply were not recognized in any jurisdiction when SLUSA was enacted.[4] A district court subsequently held that securities

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[4] State blue sky laws have always limited relief to transacting shareholders (*see, e.g.*, CCH, Inc., Blue Sky L. Rep. ¶5550 (1997)), and common law "holder" class actions are almost exclusively a post-SLUSA invention. *See WM High Yield Fund* v. *O'Hanlon*, No. 04-3423, 2005 U.S. Dist. LEXIS 12064, *41 (E.D. Pa. May 13, 2005) (noting that no Pennsylvania case had previously addressed the viability of holder claims); *Amzak Corp.* v. *Reliant Energy, Inc.*, No. 03-C0877, 2004 U.S. Dist. LEXIS 16514, *19 n.3 (N.D. Ill. Aug. 18, 2004) (same: Illinois); *Weinstein* v. *Ebbers (In re WorldCom, Inc. Sec. Litig.)*, 336 F. Supp. 2d 310, 319 (S.D.N.Y. 2004) (same: Georgia); *Shirvanian* v. *DeFrates*, No. 14-02-0447-CV, 2004 Tex. App. LEXIS 182, at *47 (Jan. 8, 2004) (same: Texas), *vacated on other grounds*, 161 S.W.3d 102 (Tex. App. 2004); *Rogers* v. *Cisco Sys., Inc.*, 268 F. Supp. 2d 1305, 1312-13 (N.D. Fla. 2003) (same: Florida); *Small* v. *Fritz Cos.*, 30 Cal. 4th 167, 171 (2003) (same: California). The few "holder" class actions that were filed prior to SLUSA were dismissed as meritless. *See Arent*, 975 F.2d 1370; *Crocker*, 826 F.2d 347; *Chanoff* v. *United States Surgical Corp.*, 857 F. Supp. 1011 (D. Conn.), *aff'd*, 33 F.3d 50 (2d Cir. 1994); *Arnlund* v. *Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 486-90 (E.D. Va. 2002). Respondent's reliance on Senator Dodd's statement that SLUSA would pre-

[Footnote continued on next page]

plaintiffs could avoid SLUSA preclusion by suing on behalf of a class of "holders" who could not meet the *Blue Chip Stamps* standing limitation. *Gordon* v. *Buntrock*, No. 00CV303, 2000 U.S. Dist. LEXIS 5977 (N.D. Ill. Apr. 28, 2000). Since then, state-law actions on behalf of "holder" classes have become commonplace. *See* Pet. 17 n.5 (listing cases). Because practically *any* Rule 10b-5 claim can be recast as a "holder" action simply by defining the class to exclude purchasers and sellers, *Gordon* provided a roadmap for securities litigants to evade both SLUSA and the PSLRA.

The whole point of SLUSA was to stop the "flight" of securities litigation to state court as plaintiffs' lawyers sought to avoid the PSLRA. *See* Pet. App. 21a (citing SLUSA § 2, 112 Stat. at 3227). The upsurge in the number of "holder" class actions since SLUSA's enactment plainly reflects continuing "flight." This is particularly troublesome, because "holder" claims present tremendous opportunities for abuse, as recognized by this Court (*Blue Chip Stamps*, 421 U.S. at 734-35, 742) and by those few jurisdictions that have decided to allow them. *See Small* v. *Fritz Cos.*, 30 Cal. 4th 167, 184-85 (2003).[5] Affirmance of the decision below would thus have the perverse effect of allowing the most pernicious category of securities fraud claims to go forward in state

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[Footnote continued from previous page]

serve "traditional state court actions" (Opp. to Pet. for Cert. 13) is thus misplaced: The "holder" class actions at issue here are *not* "traditional" state court actions by any stretch.

[5] SLUSA should not be construed to allow States to recognize *new* class action remedies on behalf of "holders" that would allow securities litigants to avoid the strictures of the PSLRA. Indeed, one of the primary motivations for SLUSA was a post-PSLRA California ballot initiative that would have dramatically expanded the state-law remedies for securities fraud. *See* Timothy J. Burger, *New Securities Reform Fight Looms*, The Recorder, Apr. 16, 1997, at 1.

court, free of the PSLRA's protections against abusive litigation—including provisions designed to prevent the exploitation of absent class members. *See* 15 U.S.C. §§ 77z-1(a) & 78u-4(a). Such suits would continue to be filed in "lottery" jurisdictions across the country, leading to *in terrorem* settlements as issuers and other market participants seek to avoid the costs of defense and the risk that "a local judge or jury may produce an idiosyncratic award." *Kircher*, 403 F.3d at 484.

Almost by definition, mutual fund investors are "holders" of securities. Approximately 92 percent of fund shareholders are saving for retirement. *2005 Investment Company Fact Book* 30. "Most shareholders have invested in mutual funds for many years; 70 percent have owned funds for at least 10 years." *Id.* at 31. More than 80 percent of mutual fund investors make *no* sales from their portfolios in a given year. *See* ICI, *Facts About Funds: A Guide To Investment Company Research About Mutual Funds & Mutual Fund Shareholders*, at 4 (2004), http://www.ici.org-/pdf/bro_factsaboutfunds.pdf. And although periodic purchases by mutual fund investors are common (through retirement contributions or dividend reinvestment, for example), a class can be defined to exclude such purchases. Thus, if "holder" class actions are allowed to proceed under state law, state-law claims could be asserted against mutual funds and their affiliates in virtually any circumstance.

While state-law "holder" class actions pose a very real threat to mutual funds and other issuers (and, ultimately, their shareholders), such lawsuits are not necessary to protect mutual fund shareholders or other investors. ICI's members, with over $8 trillion under management, have seen firsthand the problems for investors caused by abusive class action litigation. ICI supported both the PSLRA and SLUSA because those statutes promote vigorous enforcement of the securities laws while deterring strike suits that serve merely to enrich a few while diluting the returns of ordinary investors. *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 32 ("When an issuer must pay lawyers' fees, make settlement payments, and

expend management and employee resources in defending a meritless suit, the issuers' own investors suffer").

"Holder" class actions are not necessary to combat securities fraud because purchasers and sellers have sufficient recourse to hold wrongdoers accountable in private Rule 10b-5 litigation (in addition to public enforcement proceedings). Yet "holder" class actions, while unnecessary, carry enormous potential for abuse—to the detriment of issuers and investors alike. Long-term, buy-and-hold investors favor good corporate governance, predictable regulation, and effective enforcement; but they have no interest in "get rich quick" litigation, which benefits only "those who seek to line their own pockets by bringing abusive and meritless suits." H.R. Rep. No. 104-369, at 31-32. The decision below, if allowed to stand, would only encourage the proliferation of such suits, to the detriment of the investing public.

Congress has already made the *policy* determination in SLUSA that the interests of investors in the national securities markets are generally served by uniform, national standards for class action litigation; at the same time, Congress recognized the importance of certain state law remedies (in addition to public enforcement actions) and drew careful, express exemptions to safeguard them. Allowing non-transacting "holders" of securities to maintain class actions under state law cannot be squared with that carefully calibrated regime. The court below exceeded the proper judicial role in crafting an additional exemption to SLUSA preclusion for state-law "holder" class actions—an exemption that is not supported by the statutory text, its legislative history, or sound public policy. Unless corrected by this Court, America's investors will pay the price for that mistake.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae
Investment Company Institute

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IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

SHADI DABIT, on behalf of himself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* LORD, ABBETT & CO. AND EATON VANCE MANAGEMENT IN SUPPORT OF PETITIONER

CHARLES LEE EISEN
JEFFREY B. MALETTA
NICHOLAS G. TERRIS*
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
1800 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 778-9000

* *Counsel of Record* — *Counsel for Amici Curiae*

197828

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STATUTES

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National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996) (codified in part at 15 U.S.C. § 77r) 9

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Lord, Abbett & Co. LLC ("Lord Abbett") is a Delaware limited liability company, and *Amicus Curiae* Eaton Vance Management ("Eaton Vance") is a Massachusetts business trust. Both are investment advisers registered under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1, *et seq.* Lord Abbett manages one of the nation's oldest mutual fund complexes. Eaton Vance has been managing assets since 1924 and mutual funds since 1931. The mutual funds managed by *amici curiae* are investment companies registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, *et seq.* Shares of registered investment companies are "covered securities" within the meaning of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA"). *See* 15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E).

Amici curiae have a substantial interest in the issue discussed in this brief because it is relevant to pending cases in which they are defendants. *In re Lord Abbett Mutual Funds Fee Litig.*, No. 04-cv-559 (D.N.J. filed Feb. 9, 2004), 385 F. Supp. 2d 471 (D.N.J. 2005) (dismissing complaint based on SLUSA and other grounds, but allowing plaintiffs a limited opportunity to replead); *In re Eaton Vance Mutual Funds Fee Litig.*, No. 04-cv-1144 (S.D.N.Y. filed Feb. 11, 2004), 380 F. Supp. 2d 222 (S.D.N.Y. 2005) (dismissing action based on SLUSA and other grounds).

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1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their counsel, or their insurer made a monetary contribution to its preparation or submission. Letters of consent from both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF THE ARGUMENT

The court in *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), committed not one but two fundamental errors in construing SLUSA.

One of the mistakes the Second Circuit made has been raised by petitioners: the court incorrectly held that SLUSA does not preempt state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not purchase or sell) securities (sometimes referred to as "holders" claims). The *amici* will not repeat petitioners' analysis.

The court below also committed a second, logically antecedent error that is addressed in this brief. To enable it to reach the issue of whether SLUSA preempts holders claims, the Second Circuit brushed aside the statutory language requiring that, if a complaint contains one or more SLUSA-preempted claims (which the Second Circuit held that the complaints at issue did, *Dabit*, 395 F.3d at 47-49), the action must be dismissed in its entirety. *Dabit*, 395 F.3d at 47. As the Third Circuit has recognized, SLUSA "does not preempt particular 'claims' or 'counts' but rather preempts 'actions,' 15 U.S.C. § 78bb(f)(1), suggesting that if any claims alleged in a covered class action are preempted, the entire action must be dismissed." *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 305 (3d Cir. 2005).

The Second Circuit offered three reasons for declining to apply the statute as written: (1) that "the historic police powers of the states are not preempted unless it was Congress's clear and manifest purpose to do so," (2) that a

literal interpretation would mean that SLUSA is an "imprecise instrument," and (3) that the legislative history of SLUSA "indicate[s] no intent to preempt categories of state action that do not represent 'federal flight' litigation." *Dabit*, 395 F.3d at 47 (citation and internal quotation marks omitted). These are inadequate bases to depart from the statutory language. That language is more than sufficiently clear to overcome whatever presumption of preemption may apply in this context; construing the statute in a way that arguably makes it an "imprecise instrument" hardly leads to the type of absurd results that justify deviating from the statutory text; and there is no need to look to legislative history to confirm that the statute means what it says.

While it may not be necessary for the Court to issue a definitive ruling on the issue discussed herein in order to reverse the judgment below, the *amici* respectfully urge the Court at a minimum both to avoid implicitly endorsing *Dabit's* erroneous reading of the statute and to identify the issue as one that remains to be decided. Because a number of lower courts have overlooked this issue, the *amici* believe this is an instance where an "unexamined assumption[] . . . [may] becom[e], by force of usage, unsound law." *McCormick v. United States*, 500 U.S. 257, 280 (1991) (Scalia, J., concurring).

ARGUMENT [2]

The Second Circuit correctly concluded that at least some of the claims raised in each of the two actions at issue in *Dabit* were preempted by SLUSA. *See Dabit*, 395 F.3d at 47 (claims of plaintiff Dabit and the putative class for damages resulting from the owning and retention of certain stocks were preempted and dismissed without prejudice); *id.* at 48 (claims of plaintiff IJG and the putative class for commissions paid to Merrill Lynch were preempted).

That conclusion should have resolved the case. The statutory text of SLUSA mandates that, when a covered class action based upon state law includes allegations of a misrepresentation or omission of a material fact in connection with the purchase or sale, the entire action must be dismissed. As the Court of Appeals for the Third Circuit has recently explained:

> Under the statutory language, inclusion of these preempted claims within the putative class compels dismissal of the entire action. 15 U.S.C.

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2. The *amici* recognize that, at first blush, the discussion herein may appear to be outside the ambit of the question presented. As this Court has recently stated, however, "[q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." *Ballard v. Comm'r*, 125 S. Ct. 1270, 1275 n.2 (2005) (citations and internal quotation marks omitted); *see also id.* (it is appropriate to address an issue that is anterior to the specific question presented). At a minimum, the *amici* wish to avoid the possibility of this Court implicitly endorsing what the *amici* believe to be an erroneous interpretation of the statute in the course of addressing the explicit question presented.

> § 78bb(f)(1) (requiring dismissal of any covered "action" alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security").

Rowinski, 398 F.3d at 304. Stated another way:

> [SLUSA] does not preempt particular "claims" or "counts" but rather preempts "actions," 15 U.S.C. § 78bb(f)(1), suggesting that if any claims alleged in a covered class action are preempted, the entire action must be dismissed.

Id. at 305.[3] Accordingly, because as the Second Circuit correctly held, at least some "counts" of the complaints at issue in *Dabit* were preempted by SLUSA, the ***entire action*** should have been dismissed.[4]

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3. *See also* 15 U.S.C. § 78bb(f)(2) (providing for removal of covered "action"); 15 U.S.C. § 78bb(f)(5)(C) (recognizing exception to definition of "covered class action" for "an ***exclusively*** derivative action") (emphasis added). The prohibition against the "maint[enance]" of covered actions, § 78bb(f)(1), manifestly requires dismissal of such actions; merely declaring certain claims preempted but still permitting a plaintiff to continue with the action is precisely what the statute forbids. *See, e.g., Riley v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 (11th Cir. 2002) (in SLUSA, "Congress . . . require[ed] the immediate dismissal of 'covered lawsuits'"); *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927) ("To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." Maintaining a suit also includes commencing a new suit "at a later day.").

4. *See generally American Nat. Bank and Trust Co. of Chicago v. Equitable Life Assurance Soc'y*, 406 F.3d 867, 874-75 (7th Cir.

(Cont'd)

The Third Circuit's straightforward understanding of the equally straightforward statutory language comports with decisions by this Court and the Courts of Appeal recognizing that congressional use of the term "action" in generally similar contexts is a deliberate policy choice that courts are not free to disregard. In *Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), for example, the Court wrote:

> [The] federal claims suffice to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal.... Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that [the] complaints, by virtue of their federal claims, were "civil actions" within the federal courts' "original jurisdiction."

Id. at 166 (citation and internal quotation marks omitted). *See also Spring Garden Associates, L.P. v. Resolution Trust Corp.*, 26 F.3d 412, 415-16 (3d Cir. 1994) (The phrase "any action" in a removal statute differs significantly from "any claim." The "commonly understood meaning" of "any action . . . encompasses the entirety of a[] case . . . and not just [certain] claims."); *Dillon v. State of Miss. Military Dept.*, 23 F.3d 915, 918-19 (5th Cir. 1994) (court held that it is clear that the scope of removal pursuant to 28 U.S.C. § 2679(d)(2) encompasses the entire action given the "plain

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(Cont'd)

2005) ("unlike the dismissal of the complaint, which can ordinarily be amended, the dismissal of the entire action ends the litigation . . . whether the suit is dismissed with prejudice or without prejudice") (citations and internal quotation marks omitted); *United States v. Wallace & Tiernan Co., Inc.*, 336 U.S. 793, 794 n.1 (1949).